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Nos. 99-1426 and 99-1431

In The

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Conditional Cross-Petitioners,

v.

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, *et al.*,
Conditional Cross-Respondents.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITIONS FILED BY AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*, No. 99-1426, AND APPALACHIAN POWER COMPANY, *et al.*, No. 99-1431

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BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITIONS FILED BY AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*, No. 99-1426, AND APPALACHIAN POWER COMPANY, *et al.*, No. 99-1431

Citizens for Balanced Transportation, et al.,[1] oppose these cross petitions because they seek to expand the Court's review to decide constitutional arguments that need not be addressed to resolve challenges to the lawfulness of EPA's national ambient air quality standards. The questions presented by U.S. Environmental Protection Agency and other petitioners[2] seeking review of the D.C. Circuit's novel application to an agency decision of the constitutional doctrine that bars the delegation of Congress' law making power, provide no occasion to determine whether, as the American Trucking Association would have it, the Constitution bars EPA's and the D.C. Circuit's longstanding construction of § 109(b) of the Clean Air Act. The Industry petitioners seek to reopen a long settled question of statutory interpretation by asking the Court to review the 1980 decision by the D.C. Circuit Court of Appeals holding that "the [Clean Air Act] and its legislative history make clear that economic considerations play no part in the promulgation of ambient air quality standards under Section 109." *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1148 (D.C. Cir.1980). Citizens for Balanced Transportation, et al., oppose these cross petitions because there is no clause of the Constitution

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[1] Citizens For Balanced Transportation, et al., filed a timely Cross Petition, No. 99-1442, supporting the government's petition on the nondelegation question, and asking that the Court also review the court of appeal's failure to apply the proper standard for review in accord with this Court's teaching in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983), requiring an agency to "articulate a satisfactory explanation for its action. . . . ".

[2] American Lung Association, the Commonwealth of Massachusetts and the State of New Jersey.

that requires an agency to consider costs or feasibility in setting standards for the protection of public health when Congress decided not to require the agency to consider such factors.

REASONS FOR REJECTING QUESTIONS PRESENTED BY INDUSTRY PETITIONERS

None of the criteria for granting certiorari are met by the Industry cross petitions. The court of appeals' long-standing holding affirming the EPA Administrator's initial construction of § 109(b) –

1) has not been questioned by a revised construction of the Act by the agency responsible for its implementation;
2) has been consistently applied by the Court below, including the decision below in *American Trucking Associations v. EPA;*
3) is not in conflict with any decision of this Court or any other court;
4) was correctly decided even under the subsequent teaching of this Court in *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984), because the Court affirmed the agency's reasonable interpretation of the Act;
5) was consistent with Congress' enactment in 1977 of § 317, 42 U.S.C. § 7617, which intentionally omitted NAAQS from the statutory obligation imposed on EPA to consider an economic impact assessment when setting other standards under the Act; and
6) was ratified by Congress' 1990 decision to enact a new requirement in § 312, 42 U.S.C. § 7612, directing EPA to report the costs and benefits of NAAQS compliance, but not to amend § 109(b) to require EPA to consider costs as a relevant factor in setting or revising NAAQS.

For these reasons, there is no need to review the D.C. Circuit's holding in *Lead Industries*.

Most importantly, there is no need to review *Lead Industries* to avoid reaching a constitutional issue. Indeed, one of the basic flaws in the decision below was the court's determination of the nondelegation issue without first deciding whether EPA's standards were arbitrary and capricious or consistent with law. Had the Court pursued a traditional inquiry into CBT's argument that EPA failed, as in the case of the 24-hour NAAQS for fine particles, to provide a rational basis for its selection of the standards, then there would have been no occasion to reach the constitutional claims on which the decision was based. Granting the Industry cross petitions would perpetuate and compound that unnecessary and inappropriate inquiry. The Industry cross petitions should therefore be denied.

In the interests of conserving the Court's time and petitioners' resources, CBT adopts here, and relies upon, the detailed analysis of these objections to granting the Industries' cross petitions for certiorari filed by the American Lung Association, petitioner in No. 99-1295.

Respectfully submitted,

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